87-777

No.

In the Supreme Court of the United States

OCTOBER TERM, 1987

ZANDER KROWITZ,
PETITIONER,

v.

DEPARTMENT OF AGRICULTURE,
UNITED STATES FOREST SERVICE,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Question Presented for Review

Whether the United States Court of Appeals for the Sixth Circuit erred in ruling that a disclosure within the meaning of the Privacy Act, 5 U.S.C. 552a, can only occur by physical retrieval of information from a protected record immediately prior to dissemination of that information to a third party?[1]

[1] The parties below are reflected in the caption: Zander Krowitz and the U.S. Department of Agriculture.

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Opinion Below

The August 25, 1986 opinion of the United States District Court for the Western District of Michigan, Northern Division, __ F.Supp. __ (1986), and the August 14, 1987, opinion of the United States Court of Appeals for the Sixth Circuit, not reported, appear in the Appendix.

Jurisdiction

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on August 14, 1987. This petition for certiorari was filed within ninety days from that date. Jurisdiction of this court is invoked pursuant to 28 U.S.C. 1254(1).

Statement of the Case

A. *The Facts*

Petitioner Zander Krowitz began serving as the Administrative Officer, Department of Agriculture, U.S. Forest Service, Ottawa National Forest, on April 17, 1978.[1] Like many employees of the Ottawa National Forest ("ONF" or "Forest"), Mr. Krowitz and his wife, Shirley, took up residence in the Town of Ironwood, Michigan. Ironwood is a piece of smalltown Americana. Friends congregate in frontyards to watch the Fourth of July parade,[2] the men belong to the Kiwanis Club,[3] and wives do volunteer work at the local hospital,[4] and on Friday nights couples gather at the local restaurants for fish fries.[5] It was into this setting that Joseph Zylinski arrived in September 1981 to become Supervisor of the Ottawa National Forest. Upon his arrival, Mr. Krowitz took it upon himself to be the first to extend "the hand of friendship" to Mr. Zylinski and his wife by introducing them to a circle of friends with whom Mr. Krowitz and his wife associated.[6]

Shortly after his arrival at the Forest, Mr. Zylinski began to have concerns about the performance of Mr. Krowitz. Prompted by these concerns, Mr. Zylinski contacted John Karwoski, a personnal specialist at the Regional Office of the Forest Service in Milwaukee, Wisconsin, and requested that Mr. Karwoski come to the ONF to meet with Mr. Krowitz and determine his level of skills and interests. Mr. Karwoski came

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[1] The Ottawa National Forest is a tract of land of approximately 926,000 acres on the western tip of the Upper Peninsula of Michigan. It was established by an Act of Congress in 1931. The headquarters for the Forest is located in Ironwood, Michigan.

[2] Trial Record, hereinafter "T.R.", Testimony of Zander Krowitz at 110-11.

[3] *Id.* at 111-12.

[4] *Id.*, Testimony of Shirley Krowitz at 130.

[5] *Id.*, Testimony of Joseph Zylinski at 7-8.

[6] *Id.* at 6.

to the Forest in February of 1982 and met with Mr. Krowitz, Mr. Zylinski and the Deputy Forest Supervisor Frank Voytas. Following his visit to the Forest, Mr. Karwoski sent a memorandum to Mr. Zylinski stating he believed there was a 70-80 percent chance that Mr. Krowitz' performance would not meet his established performance standards,[7] and recommending that Mr. Krowitz be "isolated" in his work assignments so that his performance could be precisely monitored.[8] Upon receipt of the Karwoski memorandum in February 1982, Mr. Zylinski began keeping a file designated "Krowitz", and he placed the memo into that file and kept it in his desk.[9]

The "isolation" of Mr. Krowitz began on March 31, 1982 when Mr. Zylinski relieved him of his duties as Administrative Officer and assigned Mr. Krowitz a series of "special projects."[10] Mr. Krowitz' first special project was designated "Areas for Contracting", and was completed by the scheduled due date of June 14, 1982. Mr. Zylinski reviewed the project himself and also circulated it among ONF staff members for review.[11] On June 14, 1982, Mr. Zylinski met with Mr. Krowitz and informed him that the project was "not satisfactory and [was] unacceptable." Mr. Zylinski recorded this meeting in a memorandum to Mr. Krowitz dated September 29, 1982, and placed that memorandum in the file kept in his desk.[12]

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[7] Pursuant to 5 U.S.C. 4202-3, a federal employee who fails to meet the critical elements of his or her performance standards may be removed for unacceptable performance.

[8] T.R., Entry 44, Plaintiff's Exhibit No. 1.

[9] The file kept by Mr. Zylinski was one of at least four maintained on Mr. Krowitz by the Forest Service. There also was an employee development file and a change of status file maintained in the Personnel Office of the ONF, and an official personnel file maintained at the Forest Service Regional Office in Milwaukee. (T.R., Testimony of J. Zylinski at 15-16.) All memoranda documenting Mr. Krowitz' performance, Plaintiff's Exhibits Nos. 1 through 11, were placed into the file maintained by Mr. Zylinski.

[10] T.R., Entry 44, Plaintiff's Exhibit No. 2.

[11] *Id.* at 25.

[12] T.R., Entry 44, Plaintiff's Exhibit No. 3. Several of Mr. Zylinski's memoranda were written well after the fact. At trial, Mr. Zylinski explained this was because he felt Mr. Krowitz should focus his energies on his next assigned project. (T.R., Testimony of J. Zylinski at 40.)

Mr. Krowitz was advised to proceed with his second special project concerning implementation of the Forest Level Information Processing System ("FLIPS")—a computer system designed to meet the word and data processing needs of the Forest Service.

Throughout this period of time, Mr. Zylinski and his wife associated with the circle of friends to whom Mr. Krowitz had introduced them and participated in Friday night fish fries with the group. Mr. Zylinski continued to have concerns regarding Mr. Krowitz' work and in the summer of 1982 expressed these concerns to Mrs. Zylinski.[13] Eventually, these concerns surfaced among the Krowitz' circle of friends in the form of unsubstantiated rumors generated by Mrs. Zylinski.[14] Not wanting his personal business aired amongst his friends, Mr. Krowitz, on at least two occasions during the summer of 1982, deflected inquiries generated by the rumors by stating that there was nothing going on between him and Mr. Zylinski other than the "normal day-to-day business of supervisor and employee."[15]

From June 14 to September 30, 1982, Mr. Krowitz continued to work on the FLIPS Project. Shortly after receiving the finished product, Mr. Zylinski circulated the report to members of his staff for review and also sent a copy for review to the Regional Office in Milwaukee.[16] The FLIPS Project was evaluated by Kathleen Wolf in the Regional Office. Ms. Wolf's evaluation was reflected in an unsigned, undated memorandum which was received by Mr. Zylinski on or about November 1, 1982, and placed into Mr. Zylinski's desk file.[17] Ms. Wolf's assessment of the FLIPS Project concluded:

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[13] T.R., Testimony of J. Zylinski at 75.

[14] T.R., Entry 26, Deposition of John Fitzgerald, July 23, 1985 at p. 8; Entry 32, Deposition of James Shaw, September 13, 1985 at p. 10. Messrs. Fitzgerald and Shaw and another member of Mr. Krowitz' circle of friends, Thomas Vizanko, did not testify at trial. By joint mention of the parties, their depositions were accepted into evidence. (T.R. at 132.)

[15] T.R., Testimony of Z. Krowitz at 103-04.

[16] *Id.*, Testimony of J. Zylinski at 28.

[17] *Id.*, at 31. See also, T.R., Entry 44, Plaintiff's Exhibit No. 5.

> The Ottawa National Forest FLIPS planning document is difficult to evaluate. . . . The Ottawa package lacks much of the detail necessary to produce specific plans for site preparation. There is no mention of the Federal requirements for fire retardant walls and ceilings in the computer space. The plexiglas windows recommended for the computer walls would be extremely expensive if indeed it is possible to acquire plexiglas with the necessary fire rating. . . .
>
> The Ottawa document appears to violate several FLIPS objectives. As has been repeatedly stated, the primary and initial function of the FLIPS equipment is word processing. . . . The entire tone of this document focuses on the use of FLIPS as a data processing device. Little attention is given to the considerable number of tasks required to initially move word processing to FLIPS and later to integrate word and data processing on the same equipment. . . .

Mr. Zylinski met with Mr. Krowitz to discuss the results of the FLIPS Project on November 1, 1982 and he later memorialized this meeting in a memorandum to Mr. Krowitz on December 23, 1982, which he placed in his desk file.[18] Mr. Zylinski's assessment of the project mirrored that of Ms. Wolf:

> I have concluded that the project as submitted is unacceptable. It does not meet the objectives of the project for several reasons. Those include:
>
> 1. The document reflects your personal major concern and interests, is indicative of an apparent misunderstanding of what FLIPS really is, and focuses upon data processing as a central theme. This is erroneous. The primary function of FLIPS

[18] T.R., Entry 44, Plaintiff's Exhibit No. 9.

equipment is word processing. This emphasis on data processing injects an element of complexity into the document that makes it difficult to understand and follow.

2. Since the major objective of FLIPS is word processing, the document does not give me enough information to logically and sequentially move from where we are now to word processing and then to data processing. Your bias toward data processing distorts that sequential necessity.
3. The document contains several major technical flaws that cast an uncertainty as to its overall validity and accuracy. For instance:
    a. It does not address the need for fire retardant walls and ceilings in the computer space. This is a Federal requirement.
    b. It recommends plexiglas for a computer room wall. Not only is this extremely expensive and impractical, there is the real question of the availability of plexiglas with the appropriate fire rating characteristics.

By late November 1982, Mr. Krowitz had started work on his third special project. Hoping to satisfy Mr. Zylinski's performance criteria, Mr. Krowitz had not discussed his work-related problems with either his wife or friends.[19] At no time, did Mr. Krowitz give Mr. Zylinski permission to discuss his employment situation with anyone.[20] On his own initiative, in late November 1982, Mr. Zylinski had a series of discussions with three members of the Zylinski-Krowitz social group during which the details of Mr. Krowitz' work performance were divulged.

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[19] T.R., Testimony of Z. Krowitz, at 101, 104.

[20] *Id.* at 101.

On or about November 24, 1982, Mr. James Shaw, a friend of Mr. Krowitz and a member of the Friday night fish fry group, made a social visit to the home of Mr. and Mrs. Zylinski. According to Mr. Shaw:[21]

> . . . During the course of the evening Mr. Zylinski asked me to join him in another room to discuss something. The something was his information that he was going to terminate your [Mr. Krowitz'] employment as you were not competent to perform the tasks he assigned to you as Administrative Officer.
>
> The above statement summarizes the conversation of one and one-half hours duration. The entire time was basically that of my listening to the very lengthy and detailed account of the basis for his decision. . . .

Specifically, Mr. Shaw recalled that Mr. Zylinski discussed some six to eight projects, including the FLIPS Project, and his dissatisfaction with the FLIPS report.[22]

On or about November 26, 1982, Mr. Zylinski met John Fitzgerald, another friend of Mr. Krowitz and a member of the Friday night fish fry group, for lunch. According to Mr. Fitzgerald:[23]

> . . . My recall is that Zander [Krowitz] had—or was involved with them [the Forest Service] in an evaluation process, which Joe [Zylinski] viewed as fair and laid out, and I accepted that, in administrative terms, I have some familiarity with it, though I don't know theirs. But that Zander was coming up short, and that he expected Zander to be gone within a short time. I think he referred to the Spring.

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[21] T.R., Entry 44, Plaintiff's Exhibit No. 12, Tab. 3.

[22] T.R., Entry 32, Deposition of James Shaw at 22-24.

[23] T.R., Entry 26, Deposition of John Fitzgerald, at 9.

During this same time period, Mr. Zylinski held a similar conversation with Thomas Vizanko, yet another friend of Mr. Krowitz and member of the Friday night fish fry group. Mr. Vizanko had a difficult time remembering the specifics of that conversation other than it appeared Mr. Zylinski was trying to "get me aware of his side of the affair, or something to that effect."[24]

On December 27, 1982, Mr. Zylinski issued a performance appraisal to Mr. Krowitz for the period from October 1, 1981 to September 30, 1982.[25] Mr. Krowitz' performance was rated unacceptable on the critical element of Management Analysis and only minimally acceptable overall. On December 29, 1982, Mr. Zylinski issued a letter of warning to Mr. Krowitz indicating that if Mr. Krowitz' performance did not improve within 60 days, Mr. Zylinski would recommend his removal from federal employment.[26] Finally, on April 23, 1983, Mr. Krowitz was removed from his position as Administrative Officer at the ONF on the basis of unacceptable performance. Mr. Krowitz made timely appeal of his removal to the Merit Systems Protection Board. By order of the MSPB dated December 16, 1983, Mr. Krowitz' removal was reversed and he was ordered reinstated with back pay to the U.S. Forest Service.

B. *Proceedings Below*

On November 13, 1984, Mr. Krowitz filed a complaint in the United States District Court for the Western District of Michigan, Northern Division, against the U.S. Department of Agriculture, U.S. Forest Service, alleging violations of the Privacy Act, 5 U.S.C. 552a, and the Federal Tort Claims Act, 28 U.S.C. 2674. On December 11, 1984, an amended complaint was filed adding Mr. Krowitz' wife, Shirley, as a plain-

[24] T.R., Entry 25, Deposition of Thomas Vizanko, July 23, 1985, at 7.
[25] T.R., Entry 44, Plaintiff's Exhibit No. 10.
[26] T.R., Entry 44, Plaintiff's Exhibit No. 11.

tiff. The amended complaint alleged that the U.S. Forest Service, through Joseph Zylinski, had violated the Privacy Act and the Federal Tort Claims Act by making disclosures regarding Mr. Krowitz' work performance to John Fitzgerald, James Shaw and Thomas Vizanko on November 24-26, 1982. By order of the U.S. District Court, dated August 9, 1985, the allegations under the FTCA were dismissed as untimely. Prior to trial, the parties agreed that Mrs. Krowitz was not a proper plaintiff to the remaining allegations under the Privacy Act since no disclosure of information from records regarding Mrs. Krowitz had occurred.

A trial on the matter was held before the Honorable Judge Douglas Hillman, U.S. District Court for the Western District of Michigan, Northern Division, in Marquette, Michigan on February 20, 1986. By motion dated April 14, 1986, Mr. Krowitz moved to amend his complaint to conform with proofs offered at trial to include allegations that the Department of Agriculture had violated the Privacy Act through disclosures made by Mr. Zylinski to his wife in June 1982 and to members of the ONF staff in January 1983.[27] By order dated August 25, 1986, the U.S. District Court granted Mr. Krowitz' motion to amend his complaint, but found in favor of the Defendant Agency and accordingly entered judgment.

A timely appeal with the United States Court of Appeals for the Sixth Circuit was filed on October 2, 1986. Subsequent to the submission of briefs, oral argument was held before a panel of the Sixth Circuit on August 6, 1987. By a per curiam, unpublished decision dated August 14, 1987, the United States Court of Appeals for the Sixth Circuit affirmed the judgment of the U.S. District Court.

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[27] This latter allegation concerning disclosures to the ONF staff does not form any part of the instant petition for certiorari.

Reasons for Granting the Writ

THERE IS A SPLIT IN THE UNITED STATES COURTS OF APPEALS OVER THE DEFINITION OF A DISCLOSURE WITHIN THE MEANING OF THE PRIVACY ACT, 5 U.S.C. 552a(b).

This case involves the willful disclosure of information concerning the performance of a federal employee by his supervisor, without prior consent, to three of the employee's close friends. It is undisputed that the information disclosed was contained within records maintained within a system of records as those terms are defined by the Privacy Act, 5 U.S.C. 552a. The District Court and the Court of Appeals for the Sixth Circuit found that, in order for a disclosure under the Privacy Act to occur, there must be a retrieval of the information immediately prior to disclosure. Those courts held that no violation of the Act occurred because the information disclosed by Mr. Zylinski was based on his personal knowledge and observation of Mr. Krowitz' work. This issue squarely presented by this case is whether a plaintiff demonstrates a violation of the Privacy Act by showing that an official disclosing information contained within records had actual knowledge of the existence and contents of those records.

The Privacy Act, Pub. L. 93-579, 88 Stat. 1896 (December 31, 1974), as codified at 5 U.S.C. 552a, was born in the post-Watergate era out of Congressional concern over the maintenance and dissemination of information contained within governmental records as defined by the Act. Consistent with this concern:

> [t]he Congress finds that—
>
> (1) the privacy of an individual is directly affected by the collection, maintenance, use, and dissemination of personal information by Federal agencies;
>
> (2) the increasing use of computers and sophisticated information technology, while essential to the efficent operations of the Government, has greatly

magnified the harm to individual privacy that can occur from any collection, maintenance, use, or dissemination of personal information;

(3) the opportunities for an individual to secure employment, insurance, and credit, and his right to due process, and other legal protections are endangered by misuse of certain information systems;

(4) the right to privacy is a personal and fundamental right protected by the Constitution of the United States; and

(5) in order to protect the privacy of individuals identified in information systems maintained by Federal agencies, it is necessary and proper for the Congress to regulate the collection, maintenance, use, and dissemination of information by such agencies.

Congressional findings and statement of purpose. Pub. L. 93-579, Section 2, 88 Stat. 1896.

To effectuate these purposes, the Act provides:

> No agency shall disclose any record which is contained in a systems of records by any means of communication to any person, or to another agency except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains. . . .
>
> 5 U.S.C. 552a(b).[28]

The Act defines a record as:

> [A]ny item, collection, or grouping of information about an individual that is maintained by an agency, including,

[28] The section goes on to describe some 12 exceptions which are not applicable to the instant case. The definition of records or systems of records within the meaning of the Act is not at issue. The U.S. District Court properly found, and the Government has never challenged, that the disputed records in this case were covered by the Act.

> but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or identifying number, symbol, or other identifying particular assigned to the individual. . . .
>
> 5 U.S.C. 552a(a)(4).

To enforce the disclosure provision of the Act, Congress provided for a cause of action in U.S. District Court for violations of the Act through which injured plaintiffs could recover damages. 5 U.S.C. 552a(g). There can be little doubt that the intent of the Congress which passed the Act was to give individuals some reasonable assurance that private aspects of their lives would not become topics of public knowledge merely because some agency of the federal government maintains records on those individuals. This sentiment was stated during debate on the measure.

> This landmark legislation . . . gives an individual as a matter of right some meaningful control over how the Federal Government utilizes personal information. . . .
> . . . .
> Civil damages are available to individuals who are injured by determinations made on the basis of inaccurate or incomplete records. . . .
>
> This is just to try to make a citizen whole when the Government damages him.
>
> Remarks of Representative Moorehead, 120 Cong. Rec. 36643-46, 36959.

These same sentiments were expressed by Congressman Biaggi:

> [T]his legislation sets a new and important precedent by allowing for a civil remedy to be acquired by individuals in instances when they have been denied access to their records or whose records have been kept or used in violation of the provisions of this law.
>
> 120 Cong. Rec. 36652.

The House of Representatives itself embraced these statements of intent in its final report on the Act.

> The consent requirement may well be one of the most important, if not the most important, provisions of the bill. No such transfer [of information] could be made unless it was pursuant to a written request by the individual or by his prior written consent. This requirement would apply to all so-called "non-routine" transfers of information. It is not the Committee's intent to impede the orderly conduct of government or delay services performed in the interests of the individual. Under the conditional disclosure provisions of the bill, "routine" transfer will be permitted without the necessity of prior written consent. A "non-routine" transfer is generally one in which the personal information on an individual is used for a purpose other than originally intended.
>
> House Report No. 93-1416 at p. 12, as reprinted in Legislative History of the Privacy Act of 1974, S. 3418 (Pub. L. 93-579) at p. 306.

Congress made no attempt to define a disclosure within the meaning of the Privacy Act, leaving that task to the courts. As a result of early Privacy Act litigation involving the disclosure provision, federal courts fashioned the so-called "retrieval" or "source" rule. The rule was spawned in cases involving alleged disclosures under the Act where the federal official accused of making the disclosure either had no knowledge of the existence of the records in question, or was unaware of the contents of the record. See, e.g., *Savarese* v. *U.S. Department of Health, Education and Welfare*, 479 F.Supp. 304, *aff'd mem. sub nom.*, *Savarese* v. *Harris*, 620 F.2d 298 (5th Cir. 1980), *cert. den.* 449 U.S. 1078 (1981). Responding to plaintiff's argument that the Act covered the disclosure of any information contained within a system of records, even when the official making the disclosure was unaware of the records, the District Court stated:

> Under plaintiff's view no government employee could utter a single word concerning any person without first reviewing all systems of records within the agency to determine whether or not the information in question was contained therein. In day-to-day operations of the federal government, officials are appropriately called on to make numerous statements concerning persons who may have information concerning them contained in a system of records somewhere within the agency. It borders on the absurd to contend that all officials should have panoscopic recall concerning every record within every system of records within the agency. . . .
>
> [T]he court finds, after consideration of the Act's stated purpose, that for a disclosure to be covered by section 552a(b), there must initially have been a retrieval from the system of records which was at some point a source of the information. . . .
>
> *Id.*, 479 F.Supp. at 308.

Several courts were quick to adopt the *Savarese* holding and rationale. See, *Olberding* v. *U.S. Department of Defense*, 709 F.2d 621, 622 (8th Cir. 1983) ("It is this court's conclusion, . . . that the only disclosure actionable under section 552a(b) is one resulting from a retrieval of information initially and directly from the record contained in the system of records."); *Jackson* v. *Veterans Administration*, 503 F.Supp. 653, 656 (N.D. Ill. 1980) ("Merely because information disclosed in a telephone conversation was also contained within plaintiff's OPF [Official Personnel File] does not sustain an action for damages under the Privacy Act."); *Thomas* v. *U.S. Department of Energy*, 719 F.2d 342, 345 (10th Cir. 1983) ("The disclosure of information derived solely from independent sources is not prohibited by statute even though identical information may be contained in an agency system of records.").

In the context of these early cases, the retrieval rule made sense. As noted by the court in *Savarese*, *supra*, there is no indication that Congress sought, through the Privacy Act, to create strict liability where government officials could, unwittingly and unknowingly, violate the disclosure provision by imparting information coincidentally contained in an official government record. There also is no indication that Congress intended to restrict the disclosure provision to those instances where government officials physically retrieved and disclosed information from a record. That restriction thwarts the stated purposes of the Congress in regulating the "use and dissemination" of personal information. The reality is that government records do not appear out of thin air; they are created by people. Under the District Court's extension of the *Savarese* rationale, the creator of a record would always be free to disclose the same information which other government officials would be prohibited from disclosing under the Act. The very definition of a record under the Act mandates a contrary result:

> [T]he term "record" means any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history....
>
> 5 U.S.C. 552a(a)(4).

The concern of Congress was not limited to the use and dissemination of physical records, but extended to the information contained within those records.

In 1984, the United States Court of Appeals for the District of Columbia Circuit, found the retrieval rule made little sense when applied to the wide variety of circumstances in which an alleged violation of the Act could occur. In *Bartel* v. *Federal Aviation Administration*, 725 F.2d 1403 (D.C. Cir. 1984), an agency official commissioned an investigation into the manner

in which plaintiff obtained the complete personnel files of three fellow inspectors. Based on the results of the investigation, the official subsequently wrote to the three inspectors and informed them that plaintiff may have violated the Privacy Act in obtaining their files. Responding to arguments that the information disclosed to the three inspectors was not obtained from a system of records, the *Bartel* court wrote:

> [T]his case demonstrates that an absolute policy of limiting the Act's coverage to information physically retrieved from a record would make little sense in terms of its underlying purpose. Nor does the Act's language require such a hypertechnical interpretation. The Privacy Act forbids nonconsensual disclosure of records "by any means of communication," 5 U.S.C. 552a(b), and it requires that where disclosure is permitted, it must be accurate and complete. 5 U.S.C. 552(e)(6). Under the appellee's suggested standard, an official could circumvent both requirements with respect to a record he himself initiated by simply not reviewing it before reporting its contents or conclusions. Ironically, the Act would prohibit dissemination where such an official reviews a record in order to ensure the accuracy of the disclosure, but inadvertently mischaracterizes it, yet would immunize dissemination of the same inaccurate information if the official did not even bother to check the disclosure against the record. Thus, rigid adherence to the "retrieval standard" makes little sense in this case, whatever its merits as a guideline in other Privacy Act situations.
>
> *Id.*, at 1409 (footnote omitted).

In this case, the District Court wrote on a clean slate insofar as the Sixth Circuit was concerned. Specifically, the court found that the records generated by Mr. Zylinski and other agency officials were records as defined by the Act and were

maintained within a system of records.[29] The Court then concluded that Mr. Zylinski had not used a protected system of records to "initially gather or ultimately retrieve" the information disclosed, but rather "the source of [Mr.] Zylinski's knowledge of [Mr.] Krowitz' performance was his personal observation of and participation in supervising [Mr.] Krowitz."[30] The Court concluded:[31]

> When analyzed using the majority "retrieval" rule, it is apparent that there were no disclosures in violation of the Privacy Act in this case. The testimony of Messrs. Zylinski, Shaw, Fitzgerald and Vizanko supports a finding that the information Zylinski disclosed to his wife in June 1982 was general in nature and nothing more than independent recollections and personal opinions on his part concerning his work-related problems with Krowitz. I find no evidence of disclosures of specific records, nor any evidence that Zylinski relied upon notes and records pertaining to Krowitz' performance problems prior to or during discussions with his wife and social friends. The argument propounded by plaintiff, that by virtue of discussing any aspect of his work relationship with Krowitz, Zylinski impermissibly disclosed "records" from a "system of records" has been raised and rejected on sound grounds by several courts. *See, e.g., Savarese, supra*, 479 F.Supp. at 308.

The United States Court of Appeals for the Sixth Circuit affirmed the opinion of the lower court in a per curiam decision.

Ironically, it is the United States Court of Appeals for the Fifth Circuit which spawned the *Savarese* rationale that has shown the greatest tendency to reject it in circumstances similar to the case at bar. In *Chapman* v. *National Aeronautics*

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[29] Petitioner's Appendix at A-13.

[30] *Id.* at A-18.

[31] *Id.* at A-17 through 18.

& *Space Administration*, 682 F.2d 526 (5th Cir. 1982), the court found that otherwise private notes taken by supervisors of federal employees become subject to the Privacy Act when used for purposes other than refreshing the maker's memory.

> We agree that private note-taking offers a useful tool, aiding supervisors in recalling events when workers' evaluation reports or promotion or job assignment recommendations are being prepared. Used for these and similar legitimate purposes, notes equate with the maker's memory and are not proscribed by the Privacy Act. However, when notes bear negatively on a worker's employment status or situation, they must be handled in a manner consistent with the letter and spirit of the Privacy Act.
>
> *Id.*, at 529.

If indeed supervisory notes equate with the maker's memory and such notes must be treated consistent with the requirements of the Privacy Act, then even the *Savarese* rationale must yield to the logical conclusion that the information contained in those notes must be treated in the same fashion. Distinctions based on the initial source of the information are meaningless when viewed in light of the plain language and stated purposes of the Privacy Act.

Under the current state of affairs what constitutes a disclosure within the meaning of the Privacy Act depends upon which federal court is interpreting the Act. The D.C. Circuit has eschewed the retrieval rule in favor of a rationale that advances the purpose of the Privacy Act without unduly infringing upon the ability of the federal government to conduct legitimate business in an effective and efficient manner. Other circuits rigidly hold to a formalistic interpretation which thwarts the purpose of the Act. This split in the circuits has particular relevance to Privacy Act litigation due to its liberal venue provisions. Under subsection (g)(5):

> An action to enforce any liability created under this section may be brought in the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, without regard to the amount in controversy. . . .

Astute litigants will select their forum with care.

In the Sixth Circuit, at least, Mr. Krowitz' right to privacy under the Act meant only that Mr. Zylinski was not free to disclose, verbatim, the contents of his personnel records. It is, apparently, of no moment that Mr. Zylinski, as Mr. Krowitz' supervisor, launched the equivalent of an official investigation into his performance—an investigation during which Mr. Zylinski and other agency officials generated records ultimately used to justify Mr. Krowitz' termination from the federal service. Without Mr. Krowitz' prior consent or knowledge, Mr. Zylinski then disclosed to three of Mr. Krowitz' closest personal friends the details and results of that investigation. In the Sixth Circuit, his behavior is justified because Mr. Zylinski retained and disclosed from memory information he obtained as a result of his role as Mr. Krowitz' supervisor. In the D.C. Circuit, the same conduct—disclosure by an agency official of his determination made on the basis of an agency investigation—constitutes a violation of the Privacy Act. *Bartel*, *supra*, 725 F.2d at 1408.

The investigation in *Bartel* was no more formal than the inquiry conducted by Mr. Zylinski into Mr. Krowitz' performance. It was, in fact, required by statute and agency regulation. As early as February of 1982, Mr. Zylinski was advised that Mr. Krowitz was not likely to meet the established performance standards for his position and that he should carefully document Mr. Krowitz' performance. This advice was given pursuant to 5 U.S.C. 4301, *et seq.*, which establishes that, to the extent practicable, the performance of

federal employees must be measured by objective standards, and that such employees may only be removed after notice and an opportunity to demonstrate acceptable performance. To implement these provisions, the Forest Service has promulgated regulations regarding performance appraisals. In particular, the agency has established regulations at Title 6100, Chapter 6143, Section 4 of the Forest Service Manual:

> 4-1 Records.
>
> a. All records maintained under this chapter must meet the requirements of Part 297, of Title 5 of the Code of Federal Regulations as well as any Departmental provisions of the Privacy Act and Freedom of Information Act.
>
> . . . .
>
> 4-2. Uses of Performance Appraisals.
>
> . . . .
>
> g. Reduction-in-Grade or Removal for Unacceptable Performance—failure to meet the minimally acceptable standard of performance established by management in one or more critical elements constitutes unacceptable performance. Management shall reduce-in-grade, remove or reassign employees who continue to have unacceptable performance. Before taking such action, management must assist employees in improving unacceptable performance and provide an opportunity to demonstrate acceptable performance. Opportunities for improving performance must be documented. . . .

Interpretation of the retrieval rule by the Sixth Circuit has led to the anomalous result that Mr. Zylinski was free to disclose information contained in records regarding

Mr. Krowitz' performance, but could not have actually disclosed the records themselves. The *Bartel* court realized the full implications of the retrieval rule in declining to follow it.

> Restricting the Act's coverage to disclosure of information retrieved from a record would allow, for example, an agency investigator who, in the process of making a record, learned of some information damaging to an individual to make public that information without violating the Act....
>
> *Bartel*, *supra*, 725 F.2d at 1411, n.15.

What is at issue in this case is whether the Privacy Act protects information contained within records as the plain language of the Act clearly indicates, or, if it merely extends protection to the physical records themselves. If it is the latter, then the courts have subverted any meaning the Privacy Act holds. In its brief history, the Privacy Act, if nothing else, has demonstrated a willingness of federal courts to entertain arguments by government lawyers who engage in mental gymnastics to vault through meaningless distinctions to avoid government liability. The D.C. Circuit alone has been guardian of the purposes of the Privacy Act. Responding to recent arguments that agencies could use subsection (j)[32] of the Act to exempt themselves from civil liability for violating the disclosure provision, Judge Mikva wrote:

> We are aware that some other courts have indicated in dicta that agencies may employ subsection (j) to exempt themselves from the Act's civil remedies provision. See, e.g., *Kimberlin* v. *Department of Justice*, 788 F.2d 434, 436 n.2 (7th Cir. 1986); *Ryan* v. *Department of Justice*, 595 F.2d 954, 958 (4th Cir. 1979). Having considered the

[32] Subsection (j) provides that, pursuant to certain conditions, an agency head may exempt specific systems of records from the requirements of the Act.

> strict limitations on disclosure that Congress intended to impose. We cannot agree that at the same time it forbade agencies to exempt systems of records from disclosure requirements, Congress intended them to be able to elude civil liability at their caprice.
>
> *Tijerina* v. *Walters*, Nos. 85-6240 and 85-6241 (D.C. Cir.), Nov. 17, 1986, Slip Op. at 9.

The retrieval rule likewise reduces the Privacy Act to a "foolishness" and "defangs" the limitations on disclosure of information contained within systems of records maintained by federal agencies. It is with this Court that such "foolishness" must stop. It is this Court which must restore the bite of the Act by giving meaning to the disclosure provision. Petitioner does not ask this Court to impose upon government officials the *Savarese* burden of checking all records prior to making any utterance whatsoever. Petitioner does ask this Court to settle the split in the Courts of Appeals by giving the disclosure provision an interpretation which is consistent with both the letter and spirit of the Privacy Act: a disclosure under the Act occurs when a federal official who has knowledge that information is contained within a system of records imparts that information to third parties without the consent of the person to whom that information pertains. That interpretation gives due regard for the personal privacy of individuals that Congress sought to protect without unduly interfering with the ability of federal agencies to deal effectively and efficiently with the vast amounts of information they must process.

For petitioner, this Court represents the last stop on a long legal journey. For others who follow, it could represent the first line of protection from the unwarranted public intrusion of the federal government into the most private aspects of their lives.

Conclusion

For the foregoing reasons, Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Petition for Certiorari have been served, by mail, on this 12th day of November 1987, upon:

Solicitor General
U.S. Department of Justice
Washington, D.C. 20530

Peter B. Broida

UNITED STATES OF AMERICA
DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

No. M84-303CA2

ZANDER KROWITZ,
PLAINTIFF,

v.

DEPARTMENT OF AGRICULTURE,
UNITED STATES FOREST SERVICE,
DEFENDANT.

OPINION

This litigation stems from disclosures regarding the job performance of plaintiff Zander Krowitz ("Krowitz") during his tenure as an administrative officer ("AO") and employee of the Ottawa National Forest ("ONF"). The ONF, headquartered in Ironwood, Michigan, is operated by defendant United States Department of Agriculture, Forest Service ("Forest Service"), and the disclosures were made by Joseph Zylinski ("Zylinski"), Forest Supervisor of the ONF. Plaintiff claims that Zylinski's disclosures violated the Privacy Act of 1974, ("The Act"), specifically Section 3 thereof, codified at 5 U.S.C. §552a, concerning the disclosure of agency records maintained on individuals. Jurisdiction is premised upon 5 U.S.C. §551a(g)(1)(D).

The matter was tried to a court in Marquette, Michigan, on February 20, 1986. The court thereafter requested and received post-trial briefs from both parties. Plaintiff also filed a motion for leave to amend his complaint to conform with the evidence offered at trial. This opinion constitutes the court's ruling on that motion and the court's findings of fact and conclusions of law, as required by Rule 52(a), Fed. R. Civ. P.

Zylinski, a Forest Service employee for some 30 years, became Forest Supervisor of the ONF in September 1981. Krowitz had been employed as AO for the ONF since April 17, 1978. Upon Zylinski's arrival in Ironwood, Krowitz befriended him, introducing Mr. and Mrs. Zylinski to Mrs. Krowitz and to the Krowitz's circle of friends in the community. That circle included a Friday Night social "couples' group," comprised of the Krowitzes, the James R. Shaws, the John R. Fitzgeralds, and the Tom Vizankos.

Soon after his arrival in Ironwood, Zylinski developed concerns regarding Krowitz' work performance. Zylinski contacted Mr. Karwoski, a personnel specialist in the Forest Service's Regional Office in Milwaukee, Wisconsin. At Zylinski's request, Karwoski came to the ONF in February 1982 to assess Krowitz' skills, abilities and interests, to suggest alternative career opportunities for him, and to develop a plan of action, jointly with Zylinski, to deal with Krowitz' performance problems. Karwoski reviewed Krowitz' personnel file and interviewed Krowitz, Zylinski, and Frank Voytas, Zylinski's deputy forest supervisor. Following the visit, Karwoski sent Zylinski a memo (Pltf's Ex. 1) with his findings and suggestions. Karwoski found Krowitz to be an "idea" person with an aversion to task-oriented duties. Krowitz' AO position required him to handle the business affairs of the ONF and AO performance standards were mainly task-oriented in nature. Karwoski thus concluded that there was a 70-80 percent certainty that Krowitz would not be able to perform according to those performance standards. Karwoski suggested several alternatives, including counseling Krowitz on possible alternative job placements, while continuing to document his performance inadequacies and advise him on how they might be corrected. After reading the memo and considering its suggestions Zylinski placed it in a file identified as "AO" or "Krowitz" which he had started and kept in his desk.

In addition to this desk file folder, Zylinski identified other files generally maintained on all Forest Service employees, including Krowitz. These included an employee development file ("EDF"), containing documents pertaining to employee training, and an official personnel file ("OPF"), the latter kept at the Regional Office in Milwaukee. The EDFs for ONF employees were kept in the Ironwood office's personnel section headed by personnel officer David Weber and staffed by three employees. The personnel section was located three doors from Zylinski's office. The EDFs, to Zylinski's knowledge, were kept in locked file cabinets within that section, accessible to staff officers without permission but to others with permission only.

Zylinski met with Krowitz on March 31, 1982. In that meeting it was agreed that Krowitz' job emphasis would shift from day-to-day administrative coordination of the business management section to management analysis of a series of Forest Service programs. In a March 31, 1982 letter from Zylinski to Krowitz memorializing this meeting (Pltf's Ex. 2), Krowitz' new job responsibilities were detailed. It was noted that most of his then-current AO responsibilities were being waived to allow ample time for completion of new assigned management analysis projects, and that the changes were considered necessary because "of the difficulties experienced with existing job standards and the need to better channel and utilize [Krowitz'] skills." Zylinski further noted that "the ultimate objective of this action involves an outplacement," and Krowitz was "urged to expend extra efforts to seek out those opportunities."[1]

Zylinski met with Krowitz again on April 13, 1982 and identified a series of six projects Krowitz was to perform in his new

[1] Regarding outplacement opportunities, Krowitz traveled to Washington, D.C., on May 2 through 7, 1982, on official business. In addition to observing the Forest Service's computer show, he visited the offices of several other government agencies to discuss alternative employment possibilities, and he left his resume at various agencies.

management analyst capacity. The first, entitled "Areas for Contracting," was intended to define areas for Forest Service Contracting other than those already developed or then under contract. Krowitz began work on this project on early May 1982 and submitted his report on June 7, 1982. On June 14, 1982 Zylinski and Krowitz met to discuss the quality of that report, which Zylinski found unsatisfactory. This meeting was memorialized in a September 19, 1982 memo (Pltf's Ex. 3) from Zylinski to Krowitz.[2] Zylinski kept his copy of the memo in his desk file. At the conclusion of the June 14, 1982 meeting, Zylinski instructed Krowitz to start on the second special project, due September 30, 1982, which concerned implementation in the ONF of "FLIPS," the Forest Service's automated computerized system.[3]

Krowitz' FLIPS reports, due on September 30, 1982, was submitted to Zylinski on September 29, 1982. Zylinski reviewed it himself, had it reviewed by members of his staff, and also sent a copy to Duane Breon, a deputy regional forester at the Regional Office who had a staff experienced in the FLIPS system and its implementation. Kathleen Wolf, a member of Breon's staff, evaluated Krowitz' FLIPS report and forwarded her evaluation of that report (Pltf's Ex. 5) to Zylinski. She pointed out several errors and deficiencies in Krowitz' analysis and report.

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[2] Zylinski said the three-month delay in submitting this written evaluation of the first project was because he felt it important for Krowitz to get started on the next project.

[3] The FLIPS computerized network was eventually to connect all Forest Services offices and was designed to perform an array of data and word processing. In Fall 1982, the system was being implemented in various national forests but had not yet been implemented in the ONF. Prior to Fall 1982, Zylinski had received a general orientation on the FLIPS system during several meetings with staff at the Regional Office. He also had a FLIPS manual, or access to one, which covered requirements for locating the FLIPS hardware, fireproofing and security requirements, and other technical information pertaining to implementation and placement of the FLIPS at the ONF.

On October 5, 1982, plaintiff made a written request (Pltf's Ex. 4) to the Regional Office for assistance under the employee assistance program known as CONCERN, which was designed to help employees having problems other than in the performance area. Plaintiff's letter expressed concern about the deterioration of his AO position during the preceding six months. Zylinski eventually received a copy of this letter from the Regional Office and filed it in his desk file. Plaintiff's letter resulted in a 1½ day visit to the ONF by Ronald V. Rydberg, leader of the Regional Office's Employee Relations and Management Group. Rydberg met individually with Zylinski, Voytas and plaintiff. Following his visit, Rydberg wrote to Zylinski, on November 30, 1982, (Pltf's Ex. 6), expressing his view that the CONCERN program's purview did not embrace plaintiff's problems. He noted that what plaintiff described was not, in reality, a personal problem which he brought to work with him which interfered with his ability to perform (the type of problem CONCERN was designed to address), but rather involved problems arising strictly out of the work environment. Rydberg opined that plaintiff's poor performance was really the root of his poor relations with Forest Service officials and stated that "if he performed well, there would be no issues to discuss here." He noted that the CONCERN program did not intercede between employees and work supervisors on such work problems. He concluded that "the course remaining is to propose [Krowitz'] removal for unacceptable performance," and discussed procedural precautions pertinent to that proposed course of action. Zylinski kept his copy of this letter from Rydberg in his desk file.

Zylinski also received and filed in his desk file a copy of a November 30, 1982 letter from Mr. Carl Webb to plaintiff (Pltf's Ex. 7) summarizing the Forest Service's investigation of the concerns expressed in plaintiff's October 5, 1982 letter. Mr. Webb also opined that plaintiff's poor performance, rather than personal problems, was the root of his difficulties

at the ONF. Mr. Webb urged plaintiff to work directly with Zylinski to improve his performance and concluded that if he did "demonstrate good performance, the concerns expressed in [Krowitz'] October 5, 1982 memo will be taken care of."

On November 1, 1982, Zylinski and Krowitz met to discuss Krowitz' FLIPS project report, which Zylinski found unsatisfactory. This meeting was memorialized in a December 23, 1982 letter from Zylinski to Krowitz (Pltf's Ex. 9), which included some of the criticisms of the project expressed by Ms. Wolf, as well as Zylinski's own comments and criticisms of Krowitz' FLIPS report.[4] Zylinski kept his copy of this letter in his desk file.

Sometime after Krowitz started the third special project, which was due on February 15, 1983, Zylinski prepared some handwritten notes to himself regarding plaintiff (Pltf's Ex. 8). The notes, which Zylinski kept in his desk file, detailed the history of his performance concerns regarding Krowitz and the steps which had been taken regarding those concerns. The notes reflected that prior to Krowitz' preparation of his FLIPS report, Zylinski and the Regional Forester in Milwaukee had discussed the possibility of Krowitz being transferred to the Regional Office's FLIPS team if his FLIPS report had sufficient substance. Because of the substantive negative Regional Office evaluation by Ms. Wolf finding his FLIPS report essentially unacceptable (Pltf's Ex. 5), the notes reflected that the Regional Forester would not consider the transfer because, in his opinion, Krowitz would not contribute materially to the efforts of the Regional Office FLIPS team.

In accord with the Forest Service's fiscal year, annual performance appraisals of Forest Service employees normally cover the period from October 1 to the following September 30. Since Zylinski didn't arrive at the ONF until September

[4] The month and one-half interval between the meeting and this letter evaluation of the FLIPS report was, according to Zylinski, because he felt it was important that Krowitz get started on the third special project, which was due on February 15, 1983.

1981, Krowitz' 1980-81 appraisal was done by Deputy Forest Supervisor Voytas, who had worked with Krowitz during the preceding year. Zylinski prepared Krowitz' appraisal for the year running from October 1, 1981 to September 30, 1982.[5] That appraisal (Pltf's Ex. 10) reflected that Krowitz was meeting performance standards at a lower level than expected. Performance appraisals were filed in "employee performance" file folders, sub-files contained within employee "change-in-status" files also maintained at the ONF.

Zylinski met with Krowitz on December 27, 1982 to discuss Krowitz' work performance deficiencies. That meeting was memorialized in a December 29, 1982 "letter of warning" from Zylinski to Krowitz (Pltf's Ex. 11). The letter detailed their discussions and the steps Krowitz was expected to take to improve his performance. The letter gave Krowitz notice that if his performance did not improve to a satisfactory level within sixty days, or by February 28, 1983, Zylinski would take action to recommend his removal from his position. Zylinski kept his copy of this letter in his desk file.

On January 3, 1983, Zylinski called a staff meeting of those forest management team members who shared supervisory responsibility with him. Zylinski felt it essential for them to know what was going on at the ONF in light of rumors circulating that Krowitz had hired a Washington, D.C., attorney to defend him against a personnel action. Zylinski informed the staff that Krowitz' most recent performance evaluation had been unsatisfactory, that he had been given sixty days to improve his performance, and that the project Krowitz was currently working on was going to be used to measure his performance during that period. The staff was instructed to work with and assist him in any way they could, short of doing the work for him.

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[5] This appraisal was not prepared until December 22, 1982. Zylinski could not recall the reason for this delay in its preparation.

Krowitz was eventually discharged from his Forest Service employment on or about April 22, 1983. He appealed his discharge through the Civil Service system, and the United States Merit Systems Protection Board eventually ordered the Forest Service to reinstate him. For the last two and one-half years, Krowitz has worked as a program analyst for the Forest Service on the Huron-Manistee National Forest in Cadillac, Michigan.

Since shortly after their arrival in Ironwood in September, 1981, Zylinski and his wife had been regularly participating in Friday night "couples' group" activities with the Krowitzes, Fitzgeralds, Shaws and Vizankos, after being initially introduced into the group by the Krowitzes. As tensions between Zylinski and Krowitz mounted in the ONF office due to Krowitz' performance problems, tensions also began to mount within the social group. Rumors began to circulate in the group in the summer of 1982 regarding work tensions between Zylinski and Krowitz and the possibility that Krowitz' job might be in jeopardy. Mrs. Zylinski was purportedly the source of the rumors, passing the information on to Mrs. Fitzgerald who, in turn, told Mrs. Shaw. Messrs. Fitzgerald and Shaw heard the rumors from their wives. Zylinski stated that his wife was not privy to any detailed information regarding the case because they had a house policy not to discuss personnel problems, but he had told her in very general terms that he was having a performance problem with Krowitz.

In November of 1982, Zylinski initiated conversations with Messrs. Shaw, Vizanko and Fitzgerald. Zylinski, aware of the stress being generated in the social group, felt that continued participation by him and his wife would only lead to more stress. His sole purpose in initiating the conversations was to explain to the group members why the Zylinskis would be dropping out of the group.

On November 24, 1982, during a social gathering at the Zylinski home, Zylinski took Shaw aside to privately discuss

the matter with him. According to the deposition testimony of Shaw, (1) Zylinski said he was dissatisfied with Krowitz' job performance, did not believe he was competent to do his job, was going to dismiss him sometime in the future, and went into some detail about why he arrived at that decision; (2) Zylinski generally asserted that Krowitz was slow in performing and didn't have the requisite knowledge to complete an assigned project involving implementation of a computer data system at the ONF; (3) Zylinski generally expressed dissatisfaction with Krowitz' performance in completing assignments and spoke generally of six or eight special projects, without providing specific details of those projects or Krowitz' ability to complete them. Zylinski testified that he may have discussed some of Krowitz' projects with Shaw but only in very general terms. While Shaw may have walked away with the impression that Krowitz was going to be terminated, Zylinski said he was not thinking in terms of any imminent termination at the time of his discussion with Shaw.

Zylinski met Fitzgerald for lunch on November 26, 1982, to discuss the matter with him. At the outset, they agreed that it was common knowledge within the social group that there were work-related problems between Zylinski and Krowitz. Zylinski explained that he had advised Krowitz that his projects were unsatisfactory, that this was creating tension between them and was generating sufficient tension within the social group that the Zylinskis were going to withdraw from the group to ease the tensions. Zylinski recalls stating that Krowitz' work for him had resulted in some performance problems and he may have discussed, in very general terms, the performance evaluation process and that the end result of that process was possibly termination. Fitzgerald's deposition confirmed that Zylinski reported, in very broad terms, that Krowitz was involved in an evaluation process in which he was coming up short. Zylinski did not provide any details regarding either the process or the areas in which Krowitz was

purportedly deficient. Zylinski discussed a "time process" and tasks were implied but not specifically described, according to Fitzgerald. Fitzgerald inferred from the remarks that the process would be winding down in the next couple of months and that a decision would be reached at that time. Zylinski did not discuss any of Krowitz' specific projects, except in the very broadest references to tasks which he had not performed successfully. According to Fitzgerald, Zylinski's comments were in no way personal and Zylinski stated that he liked Krowitz on a personal level. Fitzgerald felt that Zylinski's motivation was strictly social—that, given these facts, the tensions were so great that the Zylinskis would withdraw from the social group.

Also in late November, Vizanko stopped by Zylinski's home to pick up something and Zylinski used the opportunity to advise him of the matter. Zylinski testified that he may have discussed the performance evaluation process in general terms but did not recall telling Vizanko that Krowitz was going to lose his job. Vizanko, in his deposition, recalled being informed that Krowitz was having problems at the office, but Vizanko never knew the nature of the problems and Zylinski did not discuss specifics with him, nor did he mention that a performance evaluation of Krowitz had been or was going to be done. According to Vizanko, because Zylinski did not know how the problems with Krowitz would work out, the Zylinskis were dropping out of the social group to alleviate group tensions.

Plaintiff's December 11, 1984 amended complaint alleges that the three November 1982 disclosures by Zylinski to Messrs. Shaw, Vizanko and Fitzgerald violated the Privacy Act. During the trial, counsel for plaintiff elicited testimony regarding further allegedly unlawful disclosures—the June 1982 disclosure by Zylinski to his wife of performance problems with Krowitz, and the January 1983 disclosure by Zylinski to his wife of performance problems with Krowitz, and the

January 1983 disclosures by Zylinski to his forest management team staff regarding Krowitz' unsatisfactory performance appraisal and his placement on a 60-day improvement period. Defendant objected through trial on grounds that such evidence was not within the issues framed by the pleadings. The court reserved its ruling on those objections. Following trial, plaintiff moved for leave to amend his complaint to conform with the evidence offered at trial. Defendant opposes the motion.

Pursuant to Rule 15(b), Fed. R. Civ. P.,

> "[i]f evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits."

I am satisfied that the presentation of the merits is undeniably served by allowing the amendment sought by plaintiff. I am equally satisfied that the government's defense upn the merits would not be prejudiced by such an amendment in this case.

With respect to the June 1982 disclosure by Zylinski to his wife, plaintiff appropriately points out that the government cannot offer rebuttal evidence since Zylinski himself testified that he did, in fact, disclose to his wife that he was having performance problems with Krowitz. Accordingly, permitting the admission of his testimony on this issue and the amendment sought does not seriously prejudice the government's defense on the merits.

The allegation that the January 1983 disclosures by Zylinski to his staff violated the Privacy Act was included in plaintiff's administrative complaint to the agency and was thoroughly investigated by the government at that time. Plaintiff's Ex. 12

is a thorough internal agency report by Special Agent Boren, prepared in early 1983. That report, part of the government records pertaining to this case, contains an exhaustive investigation regarding the January 1983 staff meeting disclosures. It includes signed statements from all staff members present at that meeting regarding what Zylinski disclosed to them. It is therefore apparent that the government has, since 1983, had detailed knowledge of the fact and nature of the 1983 disclosures, a factor weighing against a finding of prejudice.

For the reasons stated, plaintiff's motion for leave to amend his complaint to conform with the evidence offered at trial is hereby granted. Plaintiff's December 11, 1984 complaint is hereby deemed amended to include Privacy Act claims pertaining to the June 1982 disclosure by Zylinski to his wife, and the January 1983 staff meeting disclosures by Zylinski.

Plaintiff claims that the information disclosed by Zylinski in June 1982, November 1982, and January 1983 was or should have been contained in a system of records, as defined in the Privacy Act, and thus, those disclosures, without Krowitz' consent, violated 5 U.S.C. §552(a) which provides, in pertinent part, that:

> "[n]o agency shall disclose any record which is contained in a system of records by any means of communication to any person. . . except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be—[within any of the eleven enumerated permitted disclosures]."

It is disputed that the Forest Service is an "agency" and plaintiff is an "individual" within the meaning of this provision. The definitional section of the Act defines the term "record" to mean,

> "any item, collection, or grouping of information about an an individual that is maintained by an agency, including

> but not limited to, his education, financial transactions, medical history, and criminal or employment history, and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph."

5 U.S.C. §552(a)(4). The term "system of records" is defined to mean:

> "a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual."

5 U.S.C. §552a(a)(5). I find and conclude, and I believe defendant concedes, that plaintiff's Exhibit Nos. 1 through 11 constitutes "records" within a "system of records" within the meaning of the Act. Defendant claims, however, that there was no "disclosure of a record contained in a system of records" within the meaning of the Act because, at most, Zylinski disclosed personal opinion and belief and not information retrieved from a record within a system of records.

The Act does not define "disclosure," leaving the meaning of that term to case law development. From a review of the cases interpreting the Act, I am satisfied that the Act's purpose is "to preclude a system of records from serving as the *source* of personal information about a person that is then disclosed without the person's prior consent." (Emphasis in original.) *Olberding* v. *United States Dept. of Def., Dept. of the Army*, 564 F. Supp. 907, 913 (S.D. Iowa 1982), *aff'd*, 709 F.2d 621 (8th Cir. 1983). The Act was passed in the post-Watergate atmosphere. Congress' primary concern was controlling "the unbridled use of highly sophisticated and centralized information collecting technology," and the Act sought to remedy the threat posed by the "capacity of computers and related systems to collect and distribute great masses of personal information." *Savarese* v. *United States Dept. of Health, Education and Welfare*, 479 F. Supp. 304, 308 (N.D. Ga. 1979), *aff'd mem. sub nom, Savarese* v. *Harris*, 620 F.2d 298 (5th Cir. 1980), *cert. den.* 449 U.S. 1078.

Until 1984, courts unanimously limited the Act's coverage to prohibit only non-consensual disclosure of information initially "retrieved" from a protected system of records "which was at some point a source of the information" disclosed. *Id.*; *Olberding*, *supra*. Under the prevailing "retrieval rule" of disclosure:

> "[c]ourts . . . unanimously agreed that the Act covers more than the mere physical dissemination of records (or copies) but that it does not necessarily cover disclosure of information merely because the information happens to be contained in the records. The line they draw is that where no statutory exception applies, the Act prohibits nonconsensual disclosure of any information that has been retrieved from a protected record. *See*, *e.g.*, *Thomas* v. *United States Dept. of Energy*, 719 F.2d 341 (10th Cir. 1983); *Jackson* v. *Veterans Administration*, 503 F. Supp. 653, 656 (N.D. Ill. 1980); *Savarese* v. *United States Dept. of Health, Education & Welfare*, 479 F. Supp. 304, 307 (N.D. Ga. 1979), *aff'd mem. sub nom. Savarese* v. *Harris*, 620 F.2d 298 (5th Cir. 1980), *cert. denied*, 449 U.S. 1078, 101 S.Ct. 858, 66 L.Ed.2d 801 (1981)."

Bartel v. *Federal Aviation Administration*, 725 F.2d 1403, 1408 (D.C. Cir. 1984). In 1984, the D.C. Circuit in *Bartel* declined to apply the previously unanimous "retrieval" rule to the peculiar facts before it,[6] concluding that the rationale behind the "retrieval" rule did not support "reading out of the Act's coverage" a situation:

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[6] Bartel, while an F.A.A. air safety inspector, wanted to file an EEOC complaint on grounds of reverse discrimination. With that purpose in mind, he requested "flight times and rating" of fellow inspectors from the F.A.A. Airmen Certification Branch, after allegedly being assured that such information was public. He actually received the complete airman files of three fellow F.A.A. inspectors, files which contained both public and nonpublic information. He subsequently filed a complaint with the F.A.A. EEOC office. Vincent, chief of an F.A.A. Flight Standards Division, ordered an

"where an agency official uses the government's sophisticated. . . information collecting methods to acquire personal information for inclusion in a[n official investigative report] record and then discloses that information in an unauthorized fashion [letters to three other F.A.A. employees] without actually physically retrieving it from the record system. Threats to privacy from the government's recordkeeping emanate not only from the ease of retrieval, but also from the ease of collection and utilization of vast amounts of personal information. Given this broad lens view of privacy protection which Congress embraced, the *Savarese* rationale is consistent with extension of the Act's prohibition to nonconsensual disclosure of information as closely connected to the 'maintenance' of a record as the situation here suggests, even absent physical retrieval from a tangible recording. And, in contrast to disclosures of general office knowledge, it would hardly seem an 'intolerable burden' to restrict an agency official's discretion to disclose information in a record that he may not have read but that he had a primary role in creating and using, where it was because of that record-related role that he acquired the information in the first place."

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investigation as to an apparent Privacy Act violation by Bartel. Documents collected in the course of that investigation were placed in an investigative report. Bartel left the F.A.A. before any action was taken on the report. Almost a year after the report was prepared, Vincent, having learned that Bartel was seeking re-employment with the F.A.A. sent letters to the three inspectors whose files had been sent to Bartel. The letters notified them of Bartel's name and place of work and listed the records Bartel had received on each of them. The letters further reported that an investigation revealed that Bartel had improperly obtained their records and stated that Bartel's actions appeared to constitute a violation of the Privacy Act. Bartel sued claiming that the Vincent letters constituted prohibited nonconsensual disclosures of information about him in violation of the Privacy Act. The District Court dismissed his *pro se* complaint in a brief order contending that Bartel "had used his official position to invade the privacy of fellow employees" and that his complaint accordingly "stands the Privacy Act on its head." The D.C. Circuit vacated the dismissal and remanded the case for further proceedings, finding that Bartel's complaint stated a cause of action under the Privacy Act and that issues of fact remained with respect to his claims thereunder.

Id., 725 F.2d at 1410-1411. The *Bartel* court emphasized that the written letter disclosures "on their face purport[ed] to repeat findings and conclusions made as a result of" an investigation which the disclosing official had himself ordered. *Id.*, at 1411. The court vacated the trial court's dismissal of Bartel's *pro se* complaint, ruling that "if the facts are as Bartel states, we cannot agree. . . that the Privacy Act does not cover the sending of these letters because they did not constitute 'communication' of a protected 'record.' " *Id.*

I am satisfied that *Bartel's* holding is so inextricably intertwined with the peculiar factual situation in that case that it is not intended and should not be permitted to generally displace the previously unanimous "retrieval" rule.[7] Further, because the facts in the case at bar are not analogous to those in *Bartel*, I decline to apply its holding in this case. Zylinski did not use the government's "sophisticated information collecting methods" to acquire personal information on plaintiff for in-

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[7] The *Bartel* opinion repeatedly emphasizes the peculiar factual basis for its holding, to wit:

"Because we find that *under the peculiar circumstances of this case*, the letters did in fact communicate sensitive information contained in the [investigative report]. . . we conclude that the Act's disclosure protections may have been triggered." *Id.*, 725 F.2d at 1408. [Emphasis added]

"Although they [appellees] cite several cases from other circuits to support their position, none involved *the peculiar set of circumstances present here:* disclosure by an agency official of his official determination made on the basis of an investigation which generated a protected personnel record." *Id.*, at 1409. [Emphasis added]

"Thus, a rigid adherence to the 'retrieval standard' makes little sense *in this case*, whatever its merits as a guideline in other Privacy Act situations.

Therefore, despite dicta from other circuits, we decline to rule, *in the factual context of this case*, that the Act's coverage is restricted to information directly retrieved from a tangible recording." *Id.*, emphasis in original.

"We do not take issue with the importance of either concern in the interpretation of the Act. But, neither do we think those rationales support reading out of the Act's coverage *the situation we may be dealing*

clusion in an official investigative record, as the agency official did in *Bartel*. As stated, the *Bartel* court was concerned with the "ease of collection and utilization of vast amounts of personal information," and with the official's primary role in creating and using a record where it was because of his record-related role that he acquired the information in the first place. Zylinski's disclosures did not, as in *Bartel*, "on their face purport to repeat findings and conclusions made as a result of" an investigation which Zylinski himself had ordered. Although Krowitz' performance problems and Zylinski's attempts to deal with them generated documents falling within the Act's definition of "record" and although these "records" were contained within a "system of records" within the meaning of the Act, this is clearly not an instance, as in *Bartel*, where Zylinski used the government's sophisticated information collecting methods to gain personal information for inclusion in an investigative report which he personally ordered and then disclosed that specific report information in written form without actually retrieving it from the record system.

When analyzed using the majority "retrieval" rule, it is apparent that there were no disclosures in violation of the Privacy Act in this case. The testimony of Messrs. Zylinski, Shaw, Fitzgerald and Vizanko supports a finding that the information which Zylinski disclosed to his wife in June 1982 was general in nature and nothing more than independent recollections and personal opinions on his part concerning his work-related problems with Krowitz. I find no evidence of

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with here, where an agency official uses the government's 'sophisticated. . . information collecting' methods to acquire personal information for inclusion in a record and then discloses that information in an unauthorized fashion without actually physically retrieving it from the record system." *Id.*, at 1410 [Emphasis added]

"In short, *if the facts are as Bartel states*, we cannot agree with appellees that the Privacy Act does not cover the sending of these letters because they did not constitute 'communication' of a protected 'record.' " *Id.*, at 1411 [Emphasis added]

disclosures of specific records, nor any evidence that Zylinski relied upon notes pertaining to Krowitz' performance problems prior to or during his discussions with his wife and social friends. The argument propounded by plaintiff, that by virtue of discussing any aspect of his work relationship with Krowitz, Zylinski impermissibly disclosed "records" from a "system of records," has been raised and rejected on sound grounds by several courts. *See, e.g., Savares, supra,* 479 F. Supp. at 308.

It is well established that independent recollections and opinions are not covered by the Privacy Act. *See, e.g., Thomas, Savarese* and *Olberding, supra; Doyle* v. *Behan,* 670 F.2d 535 (5th Cir. 1982); *Fagot* v. *Federal Deposit Insurance Corp.,* 584 F. Supp. 1168 (D.C.P.R. 1984); *King* v. *Califano,* 471 F. Supp. 180 (D.D.C. 1979). Further, if the information disclosed is previously known, the disclosure does not violate the Privacy Act. *See e.g., Federal Deposit Insurance Corp.* v. *Dye,* 642 F.2d 833 (5th Cir. 1981); *King, supra.* The testimony of Messrs. Zylinski, Shaw, Vizanko and Fitzgerald establishes that the fact of Krowitz' performance problems and the possibility of his eventual termination was known, albeit in rumor form, as early as June 1982. Zylinski's conversations with Messrs. Fitzgerald, Shaw and Vizanko confirmed the rumors, but information he disclosed was, in reality, not much more than that which had previously been rumored—the general information that Krowitz was having performance problems and that his job was potentially in jeopardy because of them. There is no evidence that Zylinski utilized a protected system of records to initially gather or to ultimately retrieve the information on Krowitz which he conveyed to his wife and friends. The source of Zylinski's knowledge of Krowitz' performance was his personal observation of and participation in supervising Krowitz, not a protected record from a system of records within the meaning of the Act. The fact that Zylinski was the custodian of records within a protected system of records, and that those records contained information on

Krowitz' performance problems, does not alter my conclusion that the information Zylinski communicated to his wife and friends was not retrieved from such protected records but, rather, arose strictly from his personal knowledge and observations, fully independent of the records at issue.

Regarding the January 1983 disclosures, I am again satisfied that the information Zylinski disclosed to his staff was similarly based on personal observation and knowledge independent of any protected record. Even assuming, *arguendo*, that Zylinski had retrieved the disclosed information from records protected by the Act, I am equally satisfied that his disclosure of that information to members of the forest management team who shared supervisory responsibility with him constitutes a permitted disclosure "to those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties," pursuant to 5 U.S.C. §552a(b)(1). I have reviewed the statements of Clyde Knapp, Robert Brenner, Robert Mackender, Jim Thompson and R. B. Burton (Pltf's Ex. 12), the individuals in attendance at the staff meeting. Those statements reveal that Zylinski specifically instructed all staff members in attendance to work with and assist Krowitz on the third project during his 60-day improvement period, short of actually doing the work for him. To perform this assigned task of assisting Krowitz, it is elemental that the staff members needed to know the nature of Krowitz' performance status and problem and the nature of the project on which they were expected to assist him. Accordingly, the disclosures made by Zylinski to his staff during the January 1983 meeting clearly fall within the disclosure exception provided by 5 U.S.C. §552a(b)(1). *See*, *Beller* v. *Middendorf*, 632 F.2d 788, 799 n.6 (9th Cir. 1980), *reh. denied*, 647 F.2d 80, *cert. denied*, 454 U.S. 855, *reh. denied*, 454 U.S. 1069; *Hernandez* v. *Alexander*, 671 F.2d 402, 410 (10th Cir. 1982); *Parks* v. *United States Internal Revenue Service*, 618 F.2d 677, 680-681 (10th Cir. 1980).

The final component of plaintiff's claim is that the Forest Service violated the Privacy Act by failing to provide adequate safeguards to prevent disclosure of information protected by the Act. The record evidence, previously recited in this opinion, convinces me that this claim is without merit. Zylinski's testimony satisfies me that the records pertaining to Krowitz were complied and maintained in substantial compliance with Forest Service rules pertaining to the development and maintenance of records protected by the Act, and I find insufficient evidence to support a claim that the safeguards and rules developed by the Forest Service were inadequate in any respect.

CONCLUSION

Plaintiff's motion for leave to amend his complaint to conform with the evidence offered at trial is granted and his complaint is deemed amended to include Privacy Act claims pertaining to the June 1982 and January 1983 disclosures by Zylinski.

I find and conclude that there were no disclosures violative of the Privacy Act in this case. I further find and conclude that plaintiff has failed to prove, by a preponderance of the evidence, his claim that the Forest Service failed to provide adequate safeguards to prevent disclosure of information protected by the Act. Accordingly, plaintiff's complaint against defendant shall be dismissed, with full prejudice, and judgment shall be entered in favor of defendant, with costs as permitted by law.

(s) DOUGLAS W. HILLMAN
DOUGLAS W. HILLMAN
Chief Judge

DATED: Aug 25 1986

UNITED STATES OF AMERICA
DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

CASE NO. M84-303 CA2

ZANDER KROWITZ,
PLAINTIFF,

v.

DEPARTMENT OF AGRICULTURE,
UNITED STATES FOREST SERVICE,
DEFENDANT.

ORDER OF DISMISSAL

In accordance with the opinion filed this date,

IT IS HEREBY ORDERED that plaintiff's motion for leave to amend his complaint to conform with the evidence offered at trial is granted and his complaint is deemed amended to include Privacy Act claims pertaining to June 1982 and January 1983 disclosures by Joseph Zylinski.

IT IS FURTHER ORDERED that plaintiff's complaint against defendant is hereby dismissed, with full prejudice, and judgment shall be entered in favor of defendant, with costs as permitted by law.

(s) DOUGLAS W. HILLMAN
DOUGLAS W. HILLMAN
Chief Judge

DATED: Aug 25 1986

AO 450 (Rev. 5/85) Judgment in a Civil Case

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

CASE NUMBER: M84-303 CA2

ZANDER KROWITZ,
PLAINTIFF,

v.

DEPARTMENT OF AGRICULTURE,
UNITED STATES FOREST SERVICE,
DEFENDANT.

JUDGMENT IN A CIVIL CASE

☐ **Jury Verdict.** This case came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment be entered in favor of defendant and against plaintiff, with costs as permitted by law.

C. DUKE HYNEK, *Clerk*
(BY) (S) MELVA I. ROBERTSON
MELVA I. ROBERTSON, *Deputy Clerk*

DATE: August 25, 1986

NOT RECOMMENDED FOR
FULL-TEXT PUBLICATION
(Illegible)

FILED
AUG 14 1987
JOHN P. HEHMAN, Clerk

United States Court of Appeals
For the Sixth Circuit

No. 86-1934

ZANDER KROWITZ,
PLAINTIFF-APPELLANT,
SHIRLEY KROWITZ,
PLAINTIFF,

v.

DEPARTMENT OF AGRICULTURE;
UNITED STATES FOREST SERVICE,
DEFENDANTS-APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN.

Before:
KENNEDY, MILBURN and NORRIS, *Circuit Judges.*

PER CURIAM. Plaintiff-appellant Zander Krowitz appeals the District Court's order dismissing his Privacy Act claims against defendant-appellee Department of Agriculture, United States Forest Service.

Upon consideration of the entire record and the briefs filed herein, we affirm the judgment of the District Court for the reasons stated by Judge Hillman in his Opinion and Order filed August 25, 1986.

ISSUED AS MANDATE: September 14, 1987
COSTS: None

A True Copy
Attest: JOHN P. HEHMAN, Clerk
By (s) (Illegible), Deputy Clerk

RELEVANT STATUTES AND REGULATIONS

5 U.S.C. §552a. Records maintained on individuals

(a) Definitions. For purposes of this section—

(1) the term "agency" means agency as defined in section 552(e) of this title [5 USCS §552(e)];

(2) the term "individual" means a citizen of the United States or an alien lawfully admitted for permanent residence;

(3) the term "maintain" includes maintain, collect, use or disseminate;

(4) the term "record" means any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph;

(5) the term "system of records" means a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual;

(6) the term "statistical record" means a record in a system of records maintained for statistical research or reporting purposes only and not used in whole or in part, except as provided by section 8 of title 13; and

(7) the term "routine use" means, with respect to the disclosure of a record, the use of such record for a purpose which is compatible with the purpose for which it was collected.

(b) Conditions of Disclosure. No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another

agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be—

(1) to those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties;

(2) required under section 552 of this title [5 USCS § 552];

(3) for a routine use as defined in subsection (a)(7) of this section and described under subsection (e)(4)(D) of this section;

(4) to the Bureau of the Census for purposes of planning or carrying out a census or survey or related activity pursuant to the provisions of title 13 [13 USCS §§ 1 et seq.];

(5) to a recipient who has provided the agency with advance adequate written assurance that the record will be used solely as a statistial research or reporting record, and the record is to be transferred in a form that is not individually identifiable;

(6) to the National Archives and Records Administration as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, or for evaluation by the Archivist of the United States or the designee of the Archivist to determine whether the record has such value;

(7) to another agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity if the activity is authorized by law, and if the head of the agency or instrumentality has made a written request to the agency which maintains the record specifying the particular portion desired and the law enforcement activity for which the record is sought;

(8) to a person pursuant to a showing of compelling circumstances affecting the health or safety of an individual if upon such disclosure notification is transmitted to the last known address of such individual;
(9) to either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, ary joint committee of congress or subcommittee of any such joint committee;
(10) to the Comptroller General, or any of his authorized representatives, in the course of the performance of the duties of the General Accounting Office;
(11) pursuant to the order of a court of competent jurisdiction; or
(12) to a consumer reporting agency in accordance with section 3711(f) of title 31 [31 USCS §3711(f)].

5 U.S.C. §4301. Definitions

For the purpose of this subchapter [5 USCS §§4301 et seq.]—
(1) "agency" means—
(A) an Executive agency;
(B) the Administrative Office of the United States Courts; and
(C) the Government Printing Office;
but does not include—
(i) a Government corporation;
(ii) the Central Intelligence Agency, the Defense Intelligence Agency, the National Security Agency, or any Executive agency or unit thereof which is designated by the President and the principal function of which is the conduct of foreign intelligence or counter-intelligence activities; or
(iii) the General Accounting Office;

(2) "employee" means an individual employed in or under an agency, but does not include—
  (A) an employee outside the United States who is paid in accordance with local native prevailing wage rates for the area in which employed;
  (B) an individual in the Foreign Service of the United States;
  (C) a physician, dentist, nurse, or other employee in the Department of Medicine and Surgery, Veterans' Administration whose pay is fixed under chapter 73 of title 38 [38 USCS §§ 4101 et seq.];
  (D) an administrative law judge appointed under section 3105 of this title [5 USCS §3105];
  (E) an individual in the Senior Executive Service;
  (F) an individual appointed by the President; or
  (G) an individual occupying a position not in the competitive service excluded from coverage of this subchapter [5 USCS §§ 4301 et seq.] by regulations of the Office of Personnel Management; and
(3) "unacceptable performance" means performance of an employee which fails to meet the established performance standards in one or more critical elements of such employee's position.

§4302. Establishment of performance appraisal systems.

(a) Each agency shall develop one or more performance appraisal systems which—
  (1) provide for periodic appraisals of job performance of employees;
  (2) encourage employee participation in establishing performance standards; and
  (3) use the results of performance appraisals as a basis for training, rewarding, reassigning, promoting, reducing in grade, retaining, and removing employees;

(b) Under regulations which the Office of Personnel Management shall prescribe, each performance appraisal system shall provide for—

(1) establishing performance standards which will, to the maximum extent feasible, permit the accurate evaluation of job performance on the basis of objective criteria (which may include the extent of courtesy demonstrated to the public) related to the job in question for each employee or position under the system;

(2) as soon as practicable, but not later than October 1, 1981, with respect to initial appraisal periods, and thereafter at the beginning of each following appraisal period, communicating to each employee the performance standards and the critical elements of the employee's position;

(3) evaluating each employee during the appraisal period on such standards;

(4) recognizing and rewarding employees whose performance so warrants;

(5) assisting employees in improving unacceptable performance; and

(6) reassigning, reducing in grade, or removing employees who continue to have unacceptable performance but only after an opportunity to demonstrate acceptable performance.

§4303. Actions based on unacceptable performance

(a) Subject to the provisions of this section, an agency may reduce in grade or remove an employee for unacceptable performance.

(b)(1) An employee whose reduction in grade or removal is proposed under this section is entitled to—

(A) 30 days' advance written notice of the proposed action which identifies—

(i) specific instances of unacceptable performance by the employee on which the proposed action is based; and

(ii) the critical elements of the employee's position involved in each instance of unacceptable performance;

(B) be represented by an attorney or other representative;

(C) a reasonable time to answer orally and in writing; and

(D) a written decision which—

(i) in the case of a reduction in grade or removal under this section, specifies the instances of unacceptable performance by the employee on which the reduction in grade is based, and

(ii) unless proposed by the head of the agency, has been concurred in by an employee who is in a higher position than the employee who proposed the action.

(2) An agency may, under regulations prescribed by the head of such agency, extend the notice period under subsection (b)(1)(A) of this section for not more than 30 days. An agency may extend the notice period for more than 30 days only in accordance with regulations issued by the Office of Personnel Management.

(c) The decision to retain, reduce in grade, or remove an employee—

(1) shall be made within 30 days after the date of expiration of the notice period, and

(2) in the case of a reduction in grade or removal, may be based only on those instances of unacceptable performance by the employee—

(A) which occurred during the 1-year period ending on the date of the notice under subsection (b)(1)(A) of this section in connection with the decision; and

(B) for which the notice and other requirements of this section are complied with.

(d) If, because of performance improvements by the employee during the notice period, the employee is not reduced in grade or removed, and the employee's performance continues to be acceptable for 1 year from the date of the advance written notice provided under subsection (b)(1)(A) of this section, any entry or other notation of the unacceptable performance for which the action was proposed under this section shall be removed from any agency record relating to the employee.

(e) Any employee who is a preference eligible or is in the competitive service and who has been reduced in grade or removed under this section is entitled to appeal the action to the Merit Systems Protection Board under section 7701 of this title [5 USCS §7701].

(f) This section does not apply to—

(1) the reduction to the grade previously held of a supervisor or manager who has not completed the probationary period under section 3321(a)(2) of this title [5 USCS §3321(a)(2)],

(2) the reduction in grade or removal of an employee in the competitive service who is serving a probationary or trial period under an initial appointment or who has not completed 1 year of current continuous employment under other than a temporary appointment limited to 1 year or less, or

(3) the reduction in grade or removal of an employee in the excepted service who has not completed 1 year of current continuous employment in the same or similar positions.

U.S. DEPARTMENT OF AGRICULTURE
FOREST SERVICE MANUAL

Title 6100: Personnel Management
Chapter 6143, Section 4

4-1. Records

a. All records maintained under this chapter must meet the requirements of Part 297, of Title 5 of the Code of Federal Regulations as well as any Departmental provisions of the Privacy Act and Freedom of Information Act.

. . . .

4-2. Uses of Performance Appraisals

. . . .

g. Reduction-in-Grade or Removal for Unacceptable Performance—failure to meet the minimally acceptable standard of performance established by management in one or more critical elements constitutes unacceptable performance. Management shall reduce-in-grade, remove or reassign employees who continue to have unacceptable performance. Before taking such action, management must assist employees in improving unacceptable performance and provide an opportunity to demonstrate acceptable performance. Opportunities provided for improving performance must be documented. . . .

Title 6200; Privacy Act Records
Chapter 6272, Section 11d(k)

General Personnel Records

Performance appraisal records including: appraisal forms and supporting documentation issued under employee (including SES employees) appraisal systems; recommendations for personnel actions; Performance Review Board or Executive Resource Borad (sic) records; forms and supporting documentation issued in connection with removal actions; Letters of commendation, reprimands, admonishments, cautions, or warnings and supporting documentation; and documents certifying satisfactory completion of probationary periods or recommendations for within grade or merit pay actions.